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LEE TIOW KEE & ANOR v. NG GEOK HWA

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
ZAMANI A RAHIM JCA
ZALEHA YUSOF JCA

B

[CIVIL APPEAL NO: N-03-(IM)-105-12-2015]
21 FEBRUARY 2017

C

CONTRACT: *Breach – Sale and purchase agreement – Damages in lieu of specific performance – Assessment of – Whether valuation premised on basis of land being put to commercial use – Relevant date for computation of damages – Whether effective date for assessment of damages shall be date of subsequent sale of property to another party*

D

CONTRACT: *Damages – Assessment of – Damages in lieu of specific performance – Relevant date for computation of damages – Whether effective date for assessment of damages shall be date of subsequent sale of property to another party*

This was an appeal against the decision of the High Court Judge affirming the award of damages made by the Senior Assistant Registrar ('SAR') in the sum of RM9,770,139,50 to the respondent as damages *in lieu* of specific performance of a sale and purchase agreement ('SPA'). The subject matter of the SPA was an undivided piece of freehold land ('the land'); jointly owned in 2007 by the appellants. On 24 May 2007, the appellants granted an option to purchase the land to the respondent at an agreed purchase price of RM2.75 million. On 17 July 2007, the appellants informed the respondent that they did not intend to proceed with the SPA of the land. As a result, the respondent filed a suit against the appellants to seek for specific performance of the SPA. On 29 November 2011, the High Court dismissed the respondent's claim. The respondent appealed against the said decision to the Court of Appeal. Unknown to the respondent, the appellants sold the land to one Regent Restaurant Sdn Bhd ('Regent') on 27 April 2012. On 11 December 2013, the Court of Appeal allowed the respondent's appeal and ordered damages *in lieu* of specific performance for the respondent to be assessed before the SAR. On 20 January 2015, the SAR allowed the respondent's application for assessment of damages and ordered, *inter alia,* for the appellants to pay the respondent certain sums. Dissatisfied with the decision of the SAR, the appellants filed an appeal to the judge in chambers. The High Court Judge dismissed the appellants' appeal. Hence, the present appeal. The principal issue argued herein was: what was the relevant date for the computation of damages.

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Held (allowing appeal)

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Per Zaleha Yusof JCA delivering the judgment of the court:

(1) The measure of damages for breach of contract is to place the aggrieved party in the position as if the contract was performed. The SAR had accepted the valuation report prepared by Burgess Rawson, which

valued the land at RM12.5 million. After deducting the purchase price of RM2.75 million, the SAR awarded damages of RM9.75 million for loss of value of the land. The valuation by Burgess Rawson on 20 December 2013 was premised on the land being put to a commercial purpose. However, when the parties entered into the draft SPA in 2007, the land was actually mixed residential/commercial and not purely commercial. The SAR and High Court Judge erred in allowing a valuation premised on the basis of the land being put on commercial use. The state of mind of the parties at the time the draft SPA was entered into did not justify such valuation. (paras 17-20)

(2) The respondent had attempted to have the contract completed by filing the suit in the High Court. However, it was discovered later that the land had been sold to Regent on 27 April 2012. Hence, the effective date of assessment of damages shall be the date of the subsequent sale of the property by the appellant to Regent. In the circumstances of the case, this would be just and reasonable to all parties herein. 27 April 2012 was the date when the contract was actually lost. Thus, the order of the High Court was set aside and the matter ought to be remitted back to the SAR for damages to be assessed based on the valuation of the property as at 27 April 2012. (paras 23 & 24)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan terhadap keputusan Hakim Mahkamah Tinggi mengesahkan award ganti rugi yang dibuat oleh Penolong Kanan Pendaftar ('PKP') berjumlah RM9,770,139,50 kepada responden sebagai ganti rugi penggantian pelaksanaan spesifik satu perjanjian jual beli ('PJB'). Subjek perkara PJB adalah bahagian yang tidak berbelah bahagi tanah pegangan bebas ('tanah'); yang dimiliki bersama oleh perayu-perayu pada tahun 2007. Pada 24 Mei 2007, perayu-perayu memberikan opsyen untuk membeli tanah tersebut kepada responden pada jumlah yang dipersetujui iaitu RM2.75 juta. Pada 17 Julai 2007, perayu-perayu memaklumkan kepada responden bahawa mereka tidak berniat untuk meneruskan dengan PJB ke atas tanah tersebut. Akibatnya, responden memfailkan guaman terhadap perayu-perayu menuntut pelaksanaan spesifik PJB. Pada 29 November 2011, Mahkamah Tinggi menolak tuntutan responden. Responden merayu terhadap keputusan Mahkamah Rayuan tersebut. Tanpa diketahui responden, perayu-perayu menjual tanah tersebut kepada Regent Restaurant Sdn Bhd ('Regent') pada 27 April 2012. Pada 11 Disember 2013, Mahkamah Rayuan membenarkan rayuan responden dan memerintahkan ganti rugi sebagai ganti pelaksanaan spesifik kepada responden untuk ditaksirkan di hadapan PKP. Pada 20 Januari 2015, PKP membenarkan permohonan responden untuk taksiran ganti rugi dan memerintahkan, antara lain, perayu-perayu membayar responden jumlah tertentu. Tidak berpuas hati dengan keputusan PKP, perayu-perayu memfailkan rayuan kepada hakim dalam kamar. Hakim Mahkamah Tinggi menolak rayuan perayu-perayu. Oleh itu, rayuan ini. Isu utama yang dihujahkan adalah: apakah tarikh relevan untuk pengiraan ganti rugi.

Diputuskan (membenarkan rayuan)
Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:

(1) Ukuran ganti rugi untuk pelanggaran kontrak adalah untuk meletakkan pihak terkilan dalam kedudukan seolah-olah kontrak itu dilaksanakan. PKP telah menerima laporan penilaian yang disiap sedia oleh Burgess Rawson, yang telah menilaikan tanah pada RM12.5 juta. Selepas harga belian RM2.75 juta ditolak, PKP mengawardkan ganti rugi RM9.75 juta untuk kehilangan nilai tanah. Penilaian oleh Burgess Rawson pada 20 Disember 2013 telah diasaskan berdasarkan tanah dipertimbangkan sebagai tujuan komersial. Walau bagaimanapun, apabila pihak-pihak memasuki deraf PJB pada tahun 2007, tanah adalah campuran kediaman/komersial dan bukan hanya komersial. PKP dan Hakim Mahkamah Tinggi terkhilaf apabila membenarkan penilaian berdasarkan tanah dipertimbangkan untuk kegunaan komersial. Niat pihak-pihak yang terlibat pada waktu deraf PJB dimasuki tidak menjustifikasikan penilaian sedemikian.

(2) Responden telah mencuba menyelesaikan kontrak dengan memfailkan guaman di Mahkamah Tinggi. Walau bagaimanapun, didapati bahawa tanah dijual kepada Regent pada 27 April 2012. Oleh itu, tarikh kuat kuasa taksiran ganti rugi adalah tarikh jualan kemudian tanah itu oleh perayu kepada Regent. Dalam keadaan kes, ini adalah adil dan munasabah untuk semua pihak-pihak terlibat. 27 April 2012 adalah tarikh kontrak dilanggar. Oleh itu, perintah Mahkamah Tinggi diketepikan dan perkara diremitkan kembali kepada PKP untuk ganti rugi ditaksirkan berdasarkan nilai tanah pada 27 April 2012.

Case(s) referred to:
Czarnikow v. Koufos, The Heron II [1969] 1 AC 350 ***(refd)***
Flint v. Lovell [1935] 1 KB 354 ***(refd)***
Hadley v. Baxendale (1854) 9 ExCh 341 ***(refd)***
Johnson & Anor v. Agnew [1980] AC 367 ***(refd)***
Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd [2003] 1 CLJ 12 CA ***(refd)***
Riviera Promotions Sdn Bhd v. Genting Perkasa Sdn Bhd & Ors [2012] 9 CLJ 208 CA ***(refd)***
Transfield Shipping Inc v. Mercator Shipping Inc [2009] 1 AC 61 ***(refd)***
Victoria Laundry v. Newman [1949] 2 KB 528 ***(refd)***

For the appellants - Cecil Abraham, Rishwant Singh & Syukran Syafiq; M/s Cecil Abraham & Partners
For the respondent - Gan Khong Aik, Chen Chiu Hua & Kang Mei Yee; M/s Gan Partnership

[Editor's note: Appeal from High Court, Seremban; Civil Suit No: 22-78-2008 (remitted).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaleha Yusof JCA:

[1] This appeal was against the decision of the learned High Court Judge given on 19 October 2015 in affirming the award of damages made by the Senior Assistant Registrar (SAR) in the sum of RM9,770,139.50 to the respondent as damages *in lieu* of specific performance of a sale and purchase agreement (SPA), pursuant to the Court of Appeal order dated 11 December 2013.

[2] After perusing the records of appeal and having heard and considered the submissions made by learned counsel for the parties, oral as well as written, we allowed the appeal and set aside the order of the High Court affirming the order of the SAR on the assessment of damages. We now set out our reasons for so doing.

Background

[3] The subject matter of the SPA was an undivided piece of freehold land in Seremban, held under Grant No. 67284 Lot No. 1006, Mukim Seremban, Negeri Sembilan (the land); jointly owned in 2007 by the appellants. On 24 May 2007, the appellants granted an option to purchase the land to the respondent at an agreed purchase price of RM2.75 million. Later, on 17 July 2007, the appellants informed the respondent that they did not intend to proceed with the SPA of the land as a result of which, the respondent filed a suit against the appellants to seek for specific performance of the SPA. On 29 November 2011, the High Court dismissed the respondent's claim. The respondent appealed against the said decision to the Court of Appeal. Unknown to the respondent, the appellants sold the land to one Regent Restaurant Sdn Bhd (Regent) on 27 April 2012. On 11 December 2013, the Court of Appeal allowed the respondent's appeal and ordered damages *in lieu* of specific performance for the respondent, to be assessed before the SAR. On 20 January 2015, the SAR allowed the respondent's application for assessment of damages and ordered the followings:

(i) the appellants to pay the respondent a sum of RM9,750,000 being the loss of value of the land;

(ii) the appellants to pay the respondent a sum of RM9,663 being the valuation charges of Raine & Horne International Zaki & Partners Sdn Bhd;

(iii) the appellants to pay the respondent a sum of RM10,476.50 being the legal fees of Messrs Sheah, Tan & Rahman.

Dissatisfied with the decision of the SAR, the appellants filed an appeal to the judge in chambers. Upon hearing the appeal, the learned High Court Judge dismissed the appellants' appeal with costs of RM3,000. Hence, this appeal by the appellants before us.

A **Issue**

[4] The principal issue argued before us in this appeal was: what was the relevant date for the computation of damages.

High Court Decision

B **[5]** We only had before us the order of the learned High Court Judge affirming the order of the SAR. No grounds were given. However, we did find in the record of appeal the reasons given by the SAR for the order of assessment made by him, the relevant part of which is reproduced as follows:

C > 2. Mahkamah bersetuju dengan hujahan peguam Plaintif tarikh bermulanya taksiran gantirugi ialah tarikh keputusan dari Mahkamah Rayuan kerana Plaintif telah tidak berpeluang untuk mendapat tanah tersebut. Malah jika tarikh taksiran dibelakangkan lagi, Defendan akan lebih diprejudiskan kerana kerugian yang berlaku ke atas Plaintif adalah lebih lama.

Our Decision

D **[6]** Learned counsel for the respondent had reminded us that the decisions appealed against were concurrent findings by the SAR and the learned High Court Judge and it was a general principle that this court would not disturb concurrent findings save in the most exceptional circumstances. He had cited in his written submission the Court of Appeal's decision in *Milik Perusahaan*
E *Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12; [2003] 1 MLJ 6, an appeal against the decision of the judge in chambers which affirmed the Registrar's decision in assessment of damages. Gopal Sri Ram JCA (as he then was) held as follows:

F > How then should we approach the present appeal? In our judgment, we ought not any longer to treat a case as the present instance as one emanating from the judge alone. It is our judgment that this is essentially an appeal against concurrent findings of fact.
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> The registrar made her findings on the evidence before her and came to certain conclusions. The learned judge has agreed with those conclusions.
G The defendant therefore begins with a singular disadvantage before us. For, it is a general principle upon which this court acts that save in most exceptional circumstances, concurrent findings of fact will not be gone into by us. But that is not to say that an appeal of this nature will never succeed. If an appellant can sufficiently demonstrate to a conviction that a serious error of principle has occurred at both the lower tiers of the High
H Court, this court will have no hesitation; and indeed we are duty bound; to correct the resultant error.

[7] In the said case, the Court of Appeal dismissed the defendant's appeal on the ground that:

I > the defendant has been unable to cross the threshold set by the law on an appeal involving concurrent findings of fact or concurrent exercise of discretion. We have included the latter phrase 'concurrent exercise of discretion' because at the end of the day, an award of damages by a court in a case as this really an exercise of discretion. Save in very exceptional circumstances, it is not a mathematical certainty.

[8] However, learned counsel for the appellant submitted that just because there were concurrent findings by the SAR and the High Court Judge, that did not mean that the decision was correct. He cited the same case of *Milik Perusahaan, supra,* wherein the same Court of Appeal Judge had stated at p. 19 (CLJ); p. 12 (MLJ) as follows:

> If an appellant can sufficiently demonstrate to a conviction that a serious error of principle has occurred at both the lower tiers of the High Court, this court will have no hesitation; and indeed we are duty bound; to correct the resultant error.

[9] Learned counsel for the appellants also cited Greer LJ in *Flint v. Lovell* [1935] 1 KB 354 at p. 360 as follows:

> … the court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

[10] We totally agreed with learned counsel for the appellants. Just because this appeal was against concurrent findings of both SAR and the High Court Judge, that did not mean that we were bound to accept whatever decision presented before us especially when the decision did not serve justice to the parties.

[11] In this appeal, it was the submission on behalf of the appellant that the concurrent findings were wrong as the relevant date should be either as at the date of the breach of the contract ie, when the appellants evinced their intention not to continue with the contract, which would be on 13 July 2007 or alternatively when the judgment of the High Court was delivered on 29 November 2011 to refuse the specific performance and to dismiss the respondent's claim. The relevant date cannot be 11 December 2013, when the Court of Appeal reversed the High Court's decision because by this date, the following material events had already transpired:

(i) Regent had purchased the property by 27 April 2012 after the High Court had dismissed the respondent's claim;

(ii) On 1 August 2013, before the judgment of the Court of Appeal, Regent had applied to convert the land use to commercial building. This was granted and Regent would have paid the fee imposed by the land office; and

(iii) The property is located on the side of a main road leading into Seremban town. It was obvious to all who used the main road leading into Seremban that construction had begun on the land and the names of the new owner of the land would have been stated clearly as required by law.

[12] It was the appellants' contention that the lower court erred in relying on Regent's application to convert the land use to 'bangunan perniagaan' as this was not done by the appellants. Nor was this ever reasonably foreseeable by any of the parties at the time the sale and purchase or option was entered into. This is the legal test and the High Court did not consider this at any time.

[13] On behalf of the respondent, it was argued that the SAR was correct to rule that the date of assessment should be on 11 December 2013, ie, the date where the Court of Appeal granted specific performance to the respondent when the appellants' counsel informed the Court of Appeal that the land has been sold to Regent which caused the respondent to abort the remedy of specific performance and the Court of Appeal granted damages *in lieu* of specific performance to the respondent.

[14] The respondent further argued that the Court of Appeal in *Riviera Promotions Sdn Bhd v. Genting Perkasa Sdn Bhd & Ors* [2012] 9 CLJ 208; [2012] MLJU 875 had held that:

> Damages *in lieu* of specific performance are damages that would substitute the relief of specific performance. It is damages in equity. It is intended to place the plaintiff in the same position it would have been had the defendants not breached the SPA by refusing to execute and thereafter perform the same. It is damages that represent the potentiality or the value of the property if the court had ordered specific performance.

[15] Hence, the respondent argued, if the appellants did not sell the land to Regent, on 11 December 2013, the Court of Appeal would have ordered the appellants to transfer the land to the respondent regardless how much the land was worth as at 11 December 2013.

[16] Therefore, the respondent contended, only if this Honourable Court adopts the assessment date as at 11 December 2013, the court can achieve the objective of awarding damages *in lieu* of specific performance, that is, to grant damages that represent the potentiality or the value of the property if the court had ordered specific. Or else there would be double standard, discrepancy and inconsistency in law between ordering specific performance and damages *in lieu* of specific performance.

[17] We considered the submissions of each party very carefully. We are mindful of the principle that the measure of damages for breach of contract is to place the aggrieved party in the position as if the contract was performed.

[18] We found that the SAR had accepted the valuation report prepared by Burgess Rawson, commissioned by the respondent, which valued the land at RM12.5 million. After deducting the purchase price of RM2.75 million, the SAR awarded damages of RM9.75 million for loss of value of the land. The valuation by Burgess Rawson on 20 December 2013 was premised on the land being put to a commercial purpose.

[19] However, we noted that when the parties entered into the draft SPA in 2007, the land was actually mixed residential/commercial and not purely commercial. On this issue, our attention was drawn to the case of *Victoria Laundry v. Newman* [1949] 2 KB 528 at p. 539 wherein Asquith LJ delivering the judgment of the English Court of Appeal had stated the following:

> (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: *Wertheim v. Chicoutimi Pulp Co.* This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule …
>
> (2) In case of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
>
> (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach.
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> (4) For this purpose, knowledge "possessed" is of two kinds-one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach in that ordinary course. This is the subject-matter of the "first rule" in *Hadley v. Baxendale*, but to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the "ordinary course of things" of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.
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> (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate, not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result: see certain observations of Lord Du Parcq in *Monarch Steamship Co Ltd v. A/B Karlshamns Oljefrabriker* ([1949] 1 All ER 19).
>
> (6) Nor, finally, to make a particular loss recoverable, need it be proved that on a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is enough, to borrow from the language of Lord Du Parcq in the same case, if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger." For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.

[20] There were also many other decisions which provide the loss that is reasonably foreseeable by a party in breach is the knowledge at the time the contract is entered into. See *Hadley v. Baxendale* (1854) 9 ExCh 341, *Czarnikow v. Koufos, The Heron II* [1969] 1 AC 350 and *Transfield Shipping Inc v. Mercator Shipping Inc* [2009] 1 AC 61. As such, we agree with learned counsel for the appellants that with due respect, the SAR and learned High Court Judge erred in allowing a valuation premised on the basis of the land being put on commercial use. The state of mind of the parties at the time the draft SPA was entered into did not justify such valuation.

[21] In *Johnson & Anor v. Agnew* [1980] AC 367 the House of Lords held that:

> In the case of breach of a contract of sale, if the innocent party reasonably tried to have the contract completed, damages should be awarded as at the date when the contract was lost, so that in the present case the date for the assessment of damages should be that on which the remedy of specific performance became aborted.

[22] It was further stated in that case:

> The general principle for the assessment of damages is compensatory, ie, that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach – a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

[23] On the facts of the instant case, the respondent had attempted to have the contract completed by filing the suit in the High Court. However, it was discovered later that the land had been sold to Regent on 27 April 2012. Hence, we were of the view that the effective date of assessment of damages shall be the date of the subsequent sale of the property by the appellants to Regent. In the circumstances of the case, we felt this would be just and reasonable to all parties herein. In our view, 27 April 2012 was the date when the contract was actually lost.

Conclusion

[24] Based on the above, we allowed the appeal and set aside the order of the High Court. We ordered the matter be remitted back to the SAR for damages to be assessed based on the valuation of the property as at 27 April 2012.

[25] We also ordered the respondent to pay cost of RM30,000 as agreed by the parties, subject to payment of allocatur. Deposit be refunded.